

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Original with affidavit of
mailing*

74-2110

To be argued by
RICHARD W. BREWSTER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2110

UNITED STATES OF AMERICA,

—against—

ADRIAN CUEVAS,

Appellee,

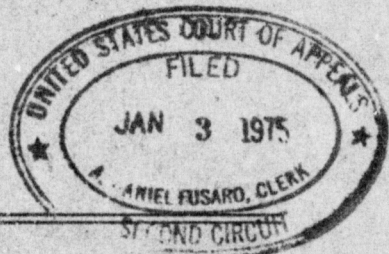
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
RICHARD W. BREWSTER,
*Assistant United States Attorneys,
Of Counsel.*



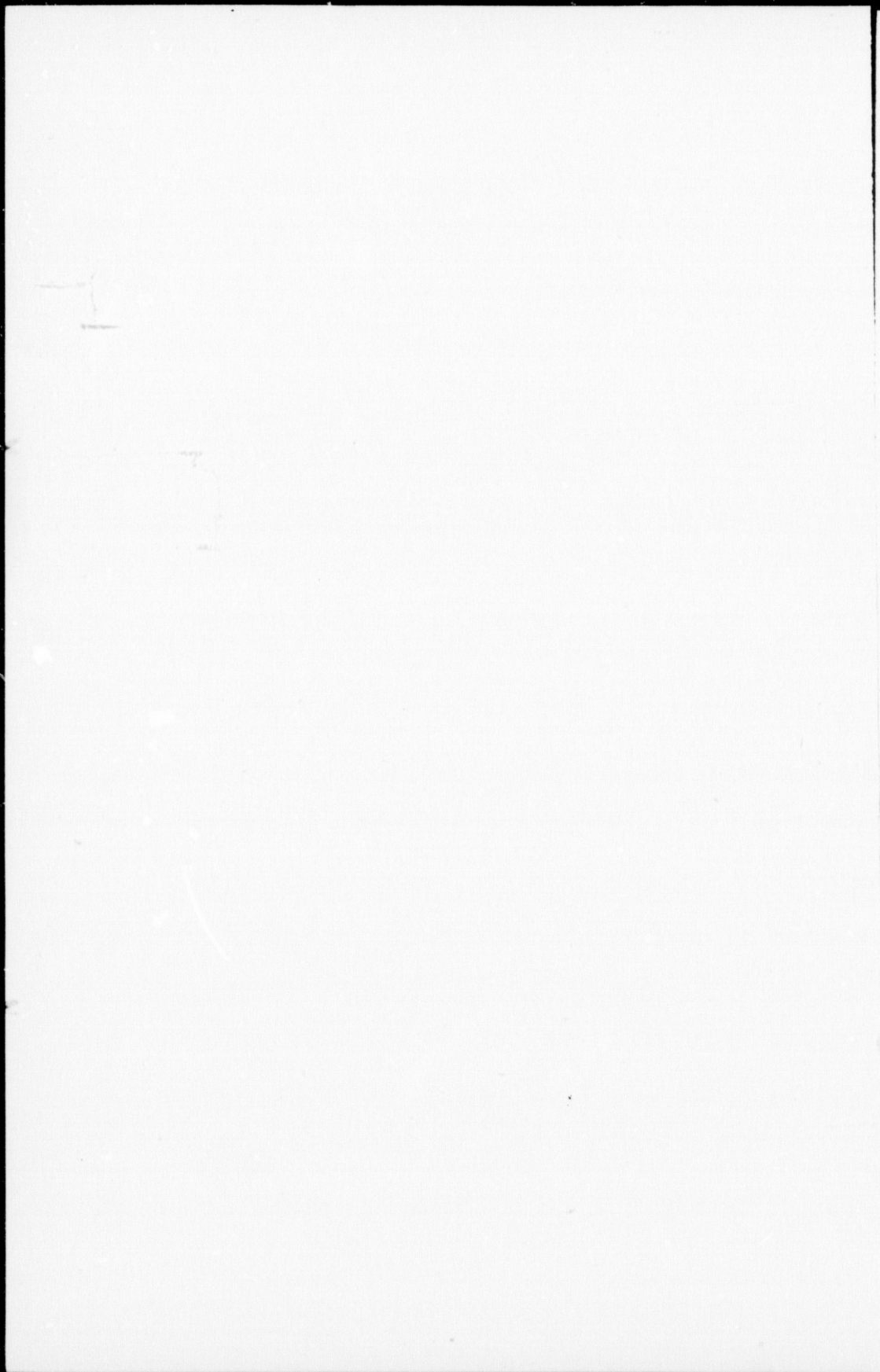


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
1. The Delivery of the Cocaine Sample	2
2. The Grand Jury Investigation	2
3. The Trial	3
ARGUMENT:	
POINT I—The character and extent of Judge Bartels' participation in this case was well within the permissible limits of his discretion and responsibilities and was entirely appropriate	5
POINT II—The prosecutor was under no obligation to advise appellant, in the grand jury, of the recantation clause in the perjury statute	11
POINT III—The record does not support appellant's claim that he was improperly summoned before the grand jury	15
CONCLUSION	17

TABLE OF CASES

<i>Adler v. United States</i> , 182 F.2d 464 (5th Cir. 1910)....	8
<i>Bronston v. United States</i> , 409 U.S. 352 (1973)	9, 16
<i>Brown v. United States</i> , 245 F.2d 549 (8th Cir. 1957)	16
<i>Jackson v. United States</i> , 329 F.2d 893 (D.C. Cir. 1964)	6
<i>People v. Ashby</i> , 8 N.Y. 2d 238 (1960)	13

	PAGE
<i>People v. Ezaugi</i> , 2 N.Y. 2d 439 (1957)	13
<i>Starr v. United States</i> , 153 U.S. 614 (1894)	7
<i>United States v. Boatner</i> , 478 F.2d 737 (2d Cir. 1973), cert. denied, 414 U.S. 848 (1973)	11
<i>United States v. Brandt</i> , 196 F.2d 653 (2d Cir. 1952)....	6, 7
<i>United States v. Bursten</i> , 395 F.2d 976 (5th Cir. 1968)	7
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	13, 14
<i>United States v. Cassiagnol</i> , 420 F.2d 868 (4th Cir. 1970)	7
<i>United States v. D'Anna</i> , 450 F.2d 1201 (2d Cir. 1971)	11
<i>United States v. DeSisto</i> , 289 F.2d 833 (2d Cir. 1961)	6, 7, 8
<i>United States v. Dionisio</i> , 410 U.S. 1 (1973)	14
<i>United States v. Fernandez</i> , 480 F.2d 726 (2d Cir. 1973)	7, 8
<i>United States v. Grayson</i> , 416 F.2d 1073 (5th Cir. 1969); cert. denied, 396 U.S. 1059 (1970)	16
<i>United States v. Grunberger</i> , 431 F.2d 1062 (2d Cir. 1970)	7
<i>United States v. Guglielmini</i> , 384 F.2d 602 (2d Cir. 1967)	7
<i>United States v. Hill</i> , 332 F.2d 105 (7th Cir. 1964)	8
<i>United States v. Icardi</i> , 140 F. Supp. 383 (D.C.C. 1956)	16
<i>United States v. Lanham</i> , 416 F.2d 1140 (5th Cir. 1969)	7
<i>United States v. Lardieri</i> , 497 F.2d 317 (3rd Cir. 1974), vacated on rehearing, December 10, 1974	11, 14
<i>United States v. Mandujano</i> , 496 F.2d 1050 (5th Cir. 1974)	17

	PAGE
<i>United States v. Marzano</i> , 149 F.2d 923 (2d Cir. 1945)	6
<i>United States v. Musgrave</i> , 444 F.2d 755 (5th Cir. 1971)	7
<i>United States v. Nazzaro</i> , 472 F.2d 302 (2d Cir. 1973) ..	6, 7
<i>United States v. Norris</i> , 300 U.S. 564 (1937)	13
<i>United States v. Pellegrino</i> , 470 F.2d 1205 (2d Cir. 1973), <i>cert. denied</i> , 411 U.S. 918 (1973)	11
<i>United States v. Reed</i> , 421 F.2d 190 (5th Cir. 1969)	8, 14
<i>United States v. Wyatt</i> , 442 F.2d 858 (D.C. Cir. 1971) ..	7, 8

OTHER AUTHORITIES

New York Penal Law, § 210.25	12
House Report No. 91-1549, 2 U.S. Code, Cong. and Adm. News 4023 (1970)	12

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2110

UNITED STATES OF AMERICA,

Appellee,

—against—

ADRIAN CUEVAS,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Adrian Cuevas appeals from a judgment of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered August 2, 1974, convicting him, following a jury trial, of violating Title 18, United States Code, Section 1623, as charged in Counts One, Two and Three of the indictment, in that he knowingly and intentionally made false material declarations before a Grand Jury on December 19, 1972. Appellant was sentenced to a prison term of three years for each count, to run concurrently. The judgement further required appellant to serve six months on each count, to run concurrently, with the execution of the remainder of the sentence suspended and a probation period of two years and six months commencing at the end of the period of incarceration. He is free on bail pending appeal.

The issues on this appeal are: (1) whether the participation by the judge in this case deprived appellant of

a fair trial; (2) whether a prosecutor must advise a Grand Jury witness of his right to recant in order to sustain a perjury conviction; and (3) whether there is evidence of improper motivation by the Government in calling appellant before the Grand Jury.

Statement of the Case

1. The Delivery of the Cocaine Sample

On February 24, 1972, Charles Martinez, an undercover narcotics officer, met with appellant at the LaColina Bar and Restaurant at 3049 Third Avenue in the Bronx. Appellant told Officer Martinez that he could supply him with "all the cocaine I [Martinez] wanted but that the cocaine he [appellant] had at the present time was of poor quality and wouldn't even take a half a cut" (6A).^{*} On March 22, 1972, appellant met again with Officer Martinez in the LaColina. After some general conversation, they discussed cocaine and appellant offered Officer Martinez one-eighth of a kilo of cocaine for \$2,000. (11A). Later in the evening of March 22, in the men's room of the LaColina, appellant handed Officer Martinez a folded one dollar bill containing a sample of cocaine. At that time appellant told Officer Martinez that he could get an eighth of a kilo of "flaked cocaine" for \$1,800 and an eighth of a kilo of "rock cocaine" for \$2,000 (12A).

2. The Grand Jury Investigation

On December 19, 1972, approximately ten months after the first meeting at the LaColina, appellant testified before a special eighteen-month grand jury under a grant of immunity. Appellant was a witness before the grand jury

^{*} Unlettered numbers in parentheses refer to pages of the trial transcript for the morning of May 20, 1974. "A" after a number refers to the afternoon session on May 20. "B" after a number refers to the session on May 21.

in connection with its investigation of narcotics trafficking. The resulting indictment was based upon a series of questions and answers concerning appellant's meetings with Officer Martinez in the LaColina.

The first half of the questioning of appellant was directed at a number of subjects other than the meetings at the LaColina. Included were discussions of the grant of immunity received by appellant, his incarceration at Sing Sing for narcotics violations, where he was born, his family life, his employment at the LaColina Bar and elsewhere, his financial stake in the LaColina and his overseas travel (G.J. 1-16). The first mention of the cocaine negotiations with Officer Martinez followed this general inquiry (G.J. 16). At that point, before appellant made any specific denials of the conversations with Officer Martinez, the prosecutor quickly injected words of caution:

"Wait a minute.

Mr. Cuevas, I want you to think about this very carefully, all right?

I'm trying to protect you as much as I am anybody else.

Mr. Cuevas, the immunity only protects you with respect to everything but perjury. Perjury is if you tell a lie" (G.J. 17).

Thereafter, the prosecutor's questioning focused on the cocaine negotiations at the LaColina. Appellant denied the substance of each of the drug-related conversations with Officer Martinez.

3. The Trial

At trial, on May 20, 1974, the Government's first witness was Lillian Cole, forelady of the special grand jury before which appellant testified. Miss Cole testified that

the grand jury was involved in an investigation of narcotics, that appellant appeared before the grand jury on December 19, 1972 and that on January 10, 1973 the grand jury indicted appellant (10-11). Next, the Government called Elizabeth Ng, the grand jury stenographer at the grand jury proceedings on December 19, 1972 (14). Miss Ng stated that on December 19, 1972, appellant testified before the grand jury under an order of immunity (15). The order of immunity was marked in evidence at trial (16). Miss Ng then testified that the December 19, 1972 grand jury testimony quoted in the indictment coincided exactly with the grand jury transcript and that the transcript accurately reflected the notes she took at the grand jury proceedings on that date (18, 28). The Government then called Officer Martinez, who testified at length concerning the events at the LaColina on February 24 and March 22, 1972 and his cocaine negotiations with appellant on those dates (3A-46A). The Government's next witness was Detective Raymond Vallely who testified as to his observations of Officer Martinez and of a confidential informant and appellant during surveillance operations which Detective Vallely conducted outside the LaColina on February 24 and March 22, 1972 (48A-52A).

On the second day of the trial the Government first called Special Agent James Harris. Agent Harris also testified as to his observations while on surveillance in the vicinity of the LaColina on February 24 and March 22, 1974 (6B-13B). The next witness for the Government was New York State Police Investigator Michael Elliot, who testified as to his mobile surveillance in the vicinity of the LaColina on March 22, 1972 and as to the custody of the narcotic evidence obtained by Officer Martinez on that date (35B-41B). Jack Fasanello, a Government chemist then testified as to the positive results of his analysis of the narcotic evidence (50B-51B). The Government's final witness was Philip V. Porto, the director of

the Drug Enforcement Administration Laboratory at which Mr. Fasanello performed his analysis. Mr. Porto testified concerning the laboratory's record-keeping procedures and the specific report relating to the narcotic evidence in this case (57B-61B). Following Mr. Porto's testimony both the Government and appellant rested (65B, 67B).

After the summations (69B-95B) and the charge by Judge Bartels (96B-124B) the jury deliberated and returned a guilty verdict on each count of the indictment (127B).

ARGUMENT

POINT I

The character and extent of Judge Bartels' participation in this case was well within the permissible limits of his discretion and responsibilities and was entirely appropriate.

Appellant asserts that the trial judge's participation in his trial was partisan and "destroyed the impartial and judicious atmosphere in the courtroom, and consequently denied appellant his right to a fair trial." The Government submits that the trial judge's participation in this case was well within his discretion and, in many instances, was in fact required by his duties. Certainly, appellant was not deprived of a fair trial.

As the Court of Appeals has stated,

"It is one of the glories of the federal criminal law administration that a district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted. Hence he will often have a duty to participate actively to that end . . ." *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir. 1960).

Indeed the trial judge cannot discharge his responsibility to see that the law is properly administered "by remaining inert." *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945). The judge "... enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues." *United States v. Brandt*, 196 F.2d 653, 655 (2d Cir. 1952). The judge should play an active role "... where necessary to clarify testimony and assist the jury in understanding the evidence." *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961). "Certainly a trial judge must be something more than a useless appendage to the trial. He bears the responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner." *United States v. Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973).*

There are circumstances where a trial judge may go so far beyond the broad ambit of his discretion and duties as to require reversal. However, an examination of the cases cited by appellant shows that these are extreme situations far different from the case at bar.**

* Appellant cites *Jackson v. United States*, 329 F.2d 893 (D.C. Cir. 1964) in which a conviction was reversed because of improper participation by the judge in the trial. Since the opinion fails to give any indication of the aspects of the record which troubled the circuit court, *Jackson* does not provide an illuminating precedent. The case does, however, suggest that since the record failed to establish that the activities of the trial judge were not prejudicial, the conviction should be reversed. To the extent that *Jackson* creates a presumption of irregularity wherever a federal judge actively participates at trial, it sharply derogates from the fundamental principles expressed in *Curcio*, *supra*, and should not be followed in this circuit.

** Where a trial judge *sua sponte* calls two witnesses awaiting sentencing by him in an effort to bully them into admitting a conspiracy with the defendant in the case on trial, *United States v. Marzano*, 149 F.2d 923 (2d Cir. 1945); lengthy and

[Footnote continued on following page]

partisan interrogation by the judge of defense witnesses, including the defendant, coupled with demeaning criticism of defense counsel, *United States v. Bursten*, 395 F.2d 976 (5th Cir. 1968); questioning by the judge to underline inconsistencies in the positions of defense witnesses and to elicit admissions bearing adversely on their credibility *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952); extensive cross-examination of the defendant by the judge in a manner indicating the judge's disbelief, cross-examination of another defense witness by the judge and damaging statements by the judge at the side bar which may have been overheard by the jury, *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973); sharp, chiding remarks directed by the judge at both the defendants and defense counsel in a case where the judge was manifestly inflamed against the defendants, who were anti-war protesters, *United States v. Cassiagnol*, 420 F.2d 868 (4th Cir. 1970); highly prejudicial instruction to the jury without any indication that the jury is not bound by the judge's comments, *United States v. Musgrave*, 444 F.2d 755 (5th Cir. 1971); hostile interrogation by the judge of the defendant and other defense witnesses and, after the government had rested, the calling and interrogation by the judge of the defendant's cellmate, *United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969); extensive questioning by the judge of defense witnesses including defendant, and an effort by the judge to belittle the defendant's alibi, *United States v. DeSisto*, 289 F.2d 833 (2d Cir. 1961); extensive cross-examination by the judge of the defendant and his alibi witnesses, coupled with an incorrect jury instruction, *United States v. Wyatt*, 442 F.2d 858 (D.C. Cir. 1971); in a close factual case, usurpation by the judge of the jury's fact-finding function, together with other errors by the judge and improprieties in the prosecutor's summation, *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970); interrogation of defense witnesses by the judge in a manner reflecting the judge's disbelief, *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973); highly inflammatory jury instructions in a case involving the killing of a deputy marshal by an Indian, *Starr v. United States*, 153 U.S. 614, 626 (1894); the demeaning by the judge of defense counsel, the admission of irrelevant and prejudicial evidence, improper argument by the prosecutor and a possibly confusing jury instruction, *United States v. Guglielmini*, 384 F.2d 602 (2d Cir. 1967); in a close factual case cross-examination of the defendant by the judge combined with the possibly improper exclusion of evidence,

[Footnote continued on following page]

The case at bar bears little resemblance to appellant's extreme precedents, save for the number of times that it was necessary for Judge Bartels to participate in questioning. Yet, it is settled law that mere mathematical computations of the number of questions asked by a judge do not furnish a basis for reversal. *United States v. DeSisto*, *supra*, 289 F.2d at 834; *United States v. Watt*, *supra*, 442 F.2d at 860; *United States v. Fernandez*, *supra*, 480 F.2d at 736-7. Here, when the specific instances of judicial participation underlying the computations are examined it will be found that the judge's actions were well within his proper discretion and responsibility.

In many instances Judge Bartels took an active role for the sake of clarification. For example, as noted on page 4 of appellant's brief, the judge came to grips with a seeming contradiction in a portion of the grand jury testimony quoted in count three of the indictment. That testimony was:

Q. Is it your testimony that you have never given anybody even a small amount of cocaine? A. No.

Q. Is it your testimony that you have never given body on the evening of March 22, 1972, a small amount of cocaine wrapped in a dollar bill? A. No.

The quoted questions and answers were merely an effort by the prosecutor to summarize questions already asked and answered earlier in the testimony quoted in count three. From the specific testimony summarized it is evident that

United States v. Hill, 332 F.2d 105 (7th Cir. 1964); critical and apparently hostile cross-examination of defense witnesses by the judge, together with an improper jury instruction, *Adler v. United States*, 182 F.2d 464 (5th Cir. 1910); warning by the judge to defense witnesses not to commit perjury where no similar warning was given to prosecution witnesses, *United States v. Reed*, 421 F.2d 190 (5th Cir. 1969).

the witness' negative answer in each case in fact meant "Yes, it is my testimony that it never happened." In bringing this out (27-28), Judge Bartels was simply eliminating a false issue from the jury's consideration. Defense counsel promptly agreed with Judge Bartels' resolution of this ambiguity, an unlikely course of conduct if the ambiguity had been central to the charge in count three rather than an unnecessary element of confusion for the jury.*

In dealing with the Government's principal witness, Officer Martinez, Judge Bartels addressed a number of questions to the witness in order to determine whether or not he was qualified as an expert to discuss the "cutting" of cocaine (6A-9A). In examining the officer's expert qualifications Judge Bartels bluntly instructed the government's witness: "Feelings don't count here. You have to know" (8A). At other times, he asked Officer Martinez clarifying questions, e.g., with respect to Officer Martinez' confusing reference to "Exhibit 1" in his case file rather than Exhibit 1 in evidence at trial (27A-28A). Again, in the course of Detective Vallely's direct examination, Judge Bartels sought to clarify the same ambiguous reference to "Exhibit 1" (57A).

Judge Bartels also eliminated needless confusion when defense counsel sought to introduce a chart of the vicinity of the LaColina through cross-examination of Detective Vallely. At first, the witness intimated that the chart was a fair representation of the area (61A) and shortly thereafter that it was not (63A). Here Judge Bartels sought

* Appellant's citation of *Bronston v. United States*, 409 U.S. 352 (1973) is misplaced. There the court held that an intentionally misleading literal answer may not constitute the predicate for a perjury indictment. Here the questions and answers summarized established the predicate for the indictment wholly apart from the prosecutor's attempted summary.

to prod counsel to develop a line of questions to resolve this inconsistency. Addressing the prosecutor, the court asked.

"Do you know what a voir dire is?

Mr. Watson: Yes.

The Court: I am inviting you to find out. Come up and ask questions" (63A).

Later, in Detective Valley's cross-examination, Judge Bartels intervened again to prompt questioning to show whether photographs of the vicinity of the LaColina constituted a fair representation and questioned the witness directly on that issue (78A-79A). Rather than a partisan intrusion into factual questions reserved for the jury, the necessary participation by Judge Bartels with respect to both the chart and photographs probed the threshold question of admissibility of evidence. Moreover, in the course of these inquiries the court did not spare the prosecutors from criticism:

"Now let's not throw any dust in the air. You know why you have two assistants here. Let's not give the impression that you are two against one." (96A)
This demeaning comment by the trial judge hardly shows partisan favor to the prosecution.

Later, during the direct examination of Agent Harris', Judge Bartels *sua sponte* sharply interrupted to narrow the witness' testimony to the events in issue:

"What relevance is this? We are not interested in that. We are interested only in what happened at the LaColina in February of 1972, and March 22, 1972. Why are we talking about these other investigations?" (8B)*

In summary, a fair reading of the entire transcript shows that, while Judge Bartels did assume an active role at the trial, his participation was by no means partisan.

Much of that participation was directed at resolving questions of evidence upon which he rather than the jury had to pass. The judge also intervened in order to clarify the evidence for the jury and eliminate irrelevant testimony. Criticism of counsel was meted out to the prosecutors as well as the defense.

Even where a judge has played "a more active role than may be desirable in most cases," a conviction should be affirmed where the judge has properly charged the jury that they are to draw no conclusions from his participation. *United States v. D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971). In the case at bar the trial judge at length instructed the jury to draw no conclusions from his statements or rulings (97B-98B). Indeed, even in a case where the trial judge showed extreme hostility to defense counsel, the conviction was upheld since "... the trial court's comments did not create an impression that he personally believed in the appellant's guilt." *United States v. Boatner*, 478 F.2d 737, 740 (2d Cir. 1973); *cert. denied*, 414 U.S. 848 (1973); see also *United States v. Pellegrino*, 470 F.2d 1205, 1207 (2d Cir. 1973), *cert. denied*, 411 U.S. 918 (1973). In upholding Boatner's conviction the court also noted that the prosecutor received a share of the judge's criticism (*Ibid*, at 740).

POINT II

The prosecutor was under no obligation to advise appellant, in the grand jury, of the recantation clause in the perjury statute.

Appellant contends that reversal is required, since the Government did not advise him, during his grand jury appearance, that he could avoid a perjury indictment by recanting his perjury.

Appellant relies, essentially, on one case, *United States v. Lardieri*, 497 F.2d 317, 321 (3d Cir. 1974). There the

court noted at the outset: "The issues raised by appellant in this criminal appeal are not sufficient to require reversal . . ." However, since the court was troubled under the particular circumstances of that case by the failure of the prosecutor to advise the grand jury witness of the recantation clause in Section 1623 of Title 18, the court remanded the case for further consideration by the trial judge of the issue, an issue which was neither briefed nor argued on appeal. The appellate court's own stance on the issue was tentative in the absence of research and argument by counsel: "If the recantation provision is to serve its purpose, it would seem to follow in some circumstances that there may be a requirement that the witness know of its existence" (*id.*, at 321).*

Upon analysis of the legislative history of § 1623 there is no support for the view that a witness must be advised of the recantation provision in order to sustain a perjury prosecution. The theory tentatively advanced in *Lardieri* should not be adopted under any circumstances. The House Report on the related bill indicates that the recantation provision in Section 1623 is modeled after § 210.25 of the New York Penal Law. H. Rep. No. 91-1549, 2 U.S. Code, Cong. and Adm. News 4023, 4024 (1970). The New York statute provides:

In any prosecution for perjury, it is an affirmative defense that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed. L. 1965, c. 1030, eff. Sept. 1, 1967.

* Following the Court's initial opinion, cited by appellant here, the issue was briefed and argued at a rehearing held on September 13, 1974 and the Third Circuit, on December 10, 1974, issued an order vacating its earlier opinion. We anticipate that the decision thereon, filed December 18, 1974, will be available at the oral argument of this appeal.

That provision was in turn a codification of the holding of the controlling New York Court of Appeals case, *People v. Ezaugi*, 2 N.Y. 2d 439 (1957). There the New York court laid down the following rule:

"Accordingly we hold that recantation as a defense is primarily designed to correct knowingly false testimony only if and when it is done promptly before the body conducting the inquiry has been deceived or misled to the harm and prejudice of its investigation, and when no reasonable likelihood exists that the witness has learned that his perjury is known or may become known to the authorities."

Although the defendant in *Ezaugi* was in fact asked if he wanted to change any of his testimony, *Ezaugi* affords no suggestion that a defendant must be advised that recantation is a defense to a perjury prosecution. See also *People v. Ashby*, 8 N.Y. 2d 238 (1960).

Indeed federal case law was far stricter, for the Supreme Court had expressly rejected any defense of recantation, even before the end of the proceeding in which the perjury is committed. *United States v. Norris*, 300 U.S. 564, 574 (1937). Thus, in order to reach the conclusion sought by appellant, this court is invited to by-pass both the legislative history of § 1623 and the pre-existing federal case law.

The Government submits that policy provides no more support for Mr. Cuevas' view than legislative history or federal case law. The purpose of a grand jury investigation is to find the truth. It is an investigative instrument rather than an adversary proceeding in which the guilt or innocence of a supposed perjurious witness is adjudicated. See *United States v. Calandra*, 414 U.S. 338 (1974). Is it to be that, in each situation where a prosecutor believes that a grand jury witness may have committed perjury, the prosecutor must interrupt the grand jury proceedings

in order to explain the recantation provisions of Section 1623(d)? Such interruptions and the resulting mini-proceedings would impede the orderly progress of the grand jury's investigation. *United States v. Calandra, supra*; *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Moreover, the recantation provision applies to perjury at trials as well. Every time a prosecutor or judge believes a defense witness may have committed perjury, must the judge or prosecutor intone the recantation clause at the witness? Such a course of action would probably require reversal under *United States v. Reed*, 421 F.2d 190 (5th Cir. 1969), a case cited by appellant. Most importantly, the requirement of a recantation warning is squarely inconsistent with the specific language of Section 1623(d). That subsection requires recantation to be made before there is a reasonable likelihood that a witness perceives that his perjury is known. Thus, if appellant's position were adopted, the perjurious witness may simply wait and see if the recantation warning is given. If the warning is not given, the witness will let his perjury stand, secure in the knowledge that he cannot be prosecuted. On the other hand, if the warning is given, the witness is put on notice that his perjury is known or suspected and can then recant with equal impunity. In short, appellant's suggestion of a warning, if adopted, would permit a deceitful witness to play a waiting game better calculated to protect perjury than bring out the truth.

Even if there may be some circumstances, which appellee does not concede, where a witness should be warned of the existence of the recantation provision, there is no justification for such a requirement in this case. In *Lardieri*, the record on appeal suggested that the prosecutor had angered the grand jury witness and that the witness may, under the circumstances, have felt cornered and locked into his testimony. The record here is in sharp contrast. After sixteen pages of relaxed questioning on a variety of sub-

jects, at the mention of the events in the LaColina, the prosecutor promptly injected words of caution:

"Wait a minute.

Mr. Cuevas, I want you to think about this very carefully, all right?

I'm trying to protect you as much as I am anybody else.

Mr. Cuevas, the immunity only protects you with respect to everything but perjury.

Perjury is if you tell a lie" (G.J. 17).

Whatever the merits of a § 1623(d) warning in other cases, in the circumstances of this case where reasoned caution was injected at the first suggestion of perjury by the witness, such a warning is not appropriate.

POINT III

The record does not support appellant's claim that he was improperly summoned before the grand jury.

Appellant's claim that there was no legitimate reason for calling him before the grand jury is without basis. As appears from the testimony at trial, the Government had ample reason to believe that Mr. Cuevas was a narcotics trafficker. Had he been a truthful grand jury witness, much valuable information could have been obtained from the grand jury proceeding as to his sources of supply and other connections in this illicit trade. He was accordingly granted immunity and appeared before the grand jury on December 19, 1972. The generalized questioning which occupied much of Mr. Cuevas' appearance shows no effort by the prosecutor to anger or otherwise entrap Mr. Cuevas into poorly considered denials of truth. Indeed, at the very first point where Mr. Cuevas made a statement incon-

sistent with Officer Martinez' reports (G.J. 17), the prosecutor made every effort to turn Mr. Cuevas away from a perjurious course of testimony. After Mr. Cuevas' repeated misstatements concerning the events at the LaColina, it became clear that Mr. Cuevas made a poor vehicle for reaching the truth and the questioning was terminated.

Appellant notes that the LaColina is not situated in the Eastern District, thus suggesting that the venue of the grand jury proceeding reflects improper motivation by the Government.* Narcotics trafficking, however, does not neatly divide itself between federal judicial districts. Narcotic drugs entering the country through the waterfront and airports of the Eastern District pass through the chain of distribution and are often sold elsewhere. In view of the realities of narcotics traffic in a metropolitan area, treating sales in one borough as irrelevant to an investigation of narcotics distribution elsewhere in the city would erect an artificial and imprudent barrier to legitimate investigation.**

* Appellant has not contended that Judge Bartels' denial of his motion for a judgment of acquittal based on the venue of the grand jury proceedings was improper. In any event, appellant's rights were not impinged, even if the grand jury venue was technically incorrect. *United States v. Grayson*, 416 F.2d 1073, 1076 (5th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970).

** The cases cited by appellant are not on point. In *Brown v. United States*, 245 F.2d 549, 554 (8th Cir. 1957), the opinion expressly permits the grand jury to consider events occurring in another district "provided the inquiry has to do with relevant matters." Moreover, in *Brown*, unlike this case, the "purpose to get him [defendant] indicted for perjury and nothing else is manifest beyond all reasonable doubt" (*Ibid*, at 555). In *Bronston*, *supra*, misleading literal answers to artless questions were the sole basis for a perjury indictment. In *United States v. Icardi*, 140 F. Supp. 383 (D.C.C. 1956) answers not material to a Congressional sub-committee investigation could not be used as a basis for a perjury indictment in a case where the defendant was not granted immunity. Appellant apparently places substantial reliance on

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York,*

PAUL B. BERGMAN,
RICHARD W. BREWSTER,
*Assistant United States Attorneys
of Counsel.*

United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974). In that case, unlike the case at bar, the defendant was called before a grand jury without any grant immunity. The court held that since he was a target, he should have received full *Miranda* warnings and also found that the proceedings violated due process. What offended the court in that case was placing the witness on the horns of a dilemma: the government knew from its previous investigation that since he did not have immunity, he would either tell the truth and implicate himself or lie and open himself up to a perjury indictment. Unlike the case at bar, the truth offered no safe harbor. The court in *Mandujano* found that such a Hobson's choice violated principles of fundamental fairness. 496 F.2d at 1057-8.

AFFIDAVIT OF M

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss
LYDIA FERNANDEZ

deposes and says that he is employed in the office of
District of New York.

That on the 3rd day of January

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked en

William J. Gallagher, Esq
The Legal Aid Society
Federal Defender Services
509 United States Court B
Foley Square, New York, N

and deponent further says that he sealed the said envelo
drop for mailing in the United States Court House, Wash
of Kings, City of New York.

Sworn to before me this

3rd day of January 19 75

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4033861
Qualified in Kings County
Commission Expires March 30, 1975

MAILING

..... being duly sworn,
the United States Attorney for the Eastern

19⁷⁵ he served a copy of the within

velope addressed to:

1.

s Unit

House

N. Y. 10007

ope and placed the same in the mail chute

hington Street, Borough of Brooklyn, County

Isidra Fernandez

ISIDRA FERNANDEZ